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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

RANDALL BOERSIG,
Petitioner,

v.

UNION ELECTRIC COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1439,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that Union Electric Company's promotional series seniority system, established as part of a carefully negotiated collective bargaining agreement between union and employer, was a bona fide seniority system under *California Brewers Association v. Bryant*?

2. Did the Court of Appeals correctly conclude that the ADA does not require an employer to violate a bona fide seniority system, established by a legitimate, carefully negotiated collective bargaining agreement, in order to give preferential treatment to an employee claiming a disability, where there is no showing that the seniority system was designed to discriminate against the disabled?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Union Electric Company advises the Court that the parent company of Union Electric Company (now d/b/a AmerenUE) is Ameren Corporation. No publicly held company owns 10% or more of Ameren Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Union Electric Company respectfully suggests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit. That opinion is reported at 219 F.3d 816.

STATEMENT OF THE CASE

Petitioner Randall Boersig, an employee of Union Electric Company (UE), filed the present action alleging that he had been discriminated against in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. Boersig has been employed at UE since 1986, and has worked in the Meter Testing and Installation Department (Meter Department) of UE as a Meter and Installation Helper (Helper) since 1989. He is a member of the International Brotherhood of Electrical Workers, Local 1439 (Union), and is subject to the terms and conditions of the collective bargaining agreement (CBA) between UE and the Union. The seniority provision of the CBA sets forth the seniority and promotion rights of Boersig and other bargaining unit members.

Under the CBA, Boersig is within a promotional series known as the "Meter Testing and Installation Seniority Division Promotional Series." The positions within that promotional series include the entry-level Helper position, and the higher level positions of Meter Installer, Meter Repairman, Power Meterman and Meter Standards Tester. Under the terms of the seniority provision of the CBA, when a vacancy occurs within a particular promotional series, it is offered first to members at the same or next highest level of the promotional

series on the basis of their promotional series seniority. If no one at the same or next highest level is interested or eligible, the position is then offered to employees at the next highest level, and so on. For example, when a Repairman position becomes available, the CBA requires that it be offered first to Installers in order of their promotional series seniority before it is offered to any Helpers. If no employee within the relevant promotional series is qualified or interested, the vacancy is placed on a bid list and is posted for five working days. The position is then filled by the bidder with the most seniority, provided he or she has the qualifications and ability to do the job.

Since the mid-80's, Boersig has been involved in a series of automobile accidents and work-related injuries, resulting in multiple surgeries and physical impairments affecting both his knees, both his wrists, his left hand, left shoulder and right hip. As a result, Boersig has permanent medical restrictions prohibiting him from kneeling, squatting and lifting over twenty-five pounds. In addition to these restrictions labeled "permanent," the record shows a long history of other limitations and restrictions claimed by Boersig, including difficulty climbing ladders and stairs and handling tools. UE provides various accommodations to Boersig to assist him in performing the Helper job functions, including, among other things, reassigning to his co-workers tasks involving heavy lifting.

Between 1994 and 1997, several Meter Installer positions became available. The Installer position is considerably more physically demanding than the Helper position. In view of Boersig's physical limitations, UE did not place him in one of these positions because it did

not believe he could perform the Installer job safely and effectively. Boersig's challenge in this lawsuit to UE's failure to promote him to any of these Installer positions was rejected by the District Court and the Eighth Circuit on the grounds that his claims were either time-barred or, insofar as they were not untimely, Boersig had failed to propose or request reasonable accommodations that would enable him to perform the essential functions of the Installer position. Boersig is not challenging this portion of the Eighth Circuit's decision.

In 1996, a Meter Repairman position became available. In accordance with the CBA, UE offered the position first to employees then working on the same promotional series level. The position was offered to and accepted by Gina Perry, who was at the time an Installer. No other Repairman openings have occurred since that time.

Boersig did not dispute that Gina Perry's promotion to Repairman was made in accordance with the CBA. He nevertheless claimed that UE and the Union should have agreed to disregard the terms of the CBA and allow him to promote directly from Helper to Repairman.[1] Boersig argued that this would be a reasonable accommodation for his "disability."[2] Alternatively, he argued

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[1] The Union has stated that it would not allow Boersig to be promoted to Repairman ahead of other individuals in the Meter Department with more promotional series seniority.

[2] The issue of whether Boersig is, in fact, "disabled" within the meaning of the ADA was disputed by UE. That issue was not decided by the trial court, which merely assumed disability for purposes of considering defendants' motions for summary judgment.

that he was invoking a disparate impact theory of liability under the ADA. According to Boersig, because individuals with his physical limitations are unable to perform the duties of the Installer position, the requirement under the CBA that a vacant Repairman position be offered to Installers before it is offered to Helpers is a "selection criterion" that is unlawful as applied to him, because it has the effect of discriminating against him without any sound business justification.

The District Court rejected these arguments, and granted summary judgment in favor of UE and the Union on all of Boersig's claims. The Eighth Circuit affirmed the judgment of the District Court in its entirety. The appellate court held that the CBA's promotional system was a bona fide seniority system, which, under clear Eighth Circuit precedent, UE was not required to violate to accommodate Boersig.

The Eighth Circuit also found unpersuasive Boersig's efforts to avoid this rule by invoking a disparate impact theory of ADA liability. The Court noted that Boersig had neither cited any authority supporting his argument that a bona fide seniority system fits within the definition of "selection criteria," nor had he otherwise convinced the Court that seniority systems should be considered "selection criteria" within the meaning of the disparate impact provision of the ADA, 42 U.S.C. § 12112(b)(6).[3] To the contrary, the Court noted the strong policy reasons that counsel against disrupting a

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[3] Section 12112(b)(6) states that employers cannot use "selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" unless such criteria are "shown to be job-related for the position in question and [are] consistent with business necessity."

carefully negotiated agreement between union and employer at the expense of other union employees who hold legitimate expectations of advancement based on the governing CBA. Such judicial intrusion, the Eighth Circuit pointed out, is particularly unwarranted where, as here, there is absolutely no evidence – and Boersig has never claimed — that the seniority system was incorporated into the CBA for any improper or discriminatory purpose. *Boersig v. Union Electric Company*, 219 F.3d 816, 822-23 (8th Cir. 2000).

REASONS FOR DENYING THE WRIT

I. The Eighth Circuit's Holding That UE's Promotional System is a Bona Fide Seniority System is Entirely Consistent with *California Brewers.*

Boersig argues that the Eighth Circuit's holding that the CBA's promotional system is a bona fide seniority system "clashes" with this Court's decision in *California Brewers Association v. Bryant*, 444 U.S. 598 (1980). This argument is based on a fundamental misreading of the holding in *California Brewers*.

In an effort to manufacture a conflict with *California Brewers,* Boersig attempts to bifurcate the language of the seniority provision in question. He suggests that there are two separate considerations in the CBA for promotion to Repairman: first, that Installers must be offered the job ahead of Helpers, and second, that the position must be offered to employees in order of their length of service within the seniority division. He contends that only the second consideration "may be" a seniority rule, whereas the first consideration – giving preference to Installers over Helpers – "has nothing to

do with length of service and cannot be characterized as a seniority rule."[4]

California Brewers does not, however, support the unduly narrow construction plaintiff asserts. To the contrary, the CBA provision at issue here falls comfortably within the reasoning in *California Brewers*.

In discussing the exemption for seniority systems under Title VII, 42 U.S.C. § 2000e – 2(h), this Court explained in *California Brewers* that a "seniority system" is a scheme that may involve seniority and non-seniority criteria, and that the exemption for seniority systems under Title VII "quite evidently" includes

> more than simply those components of any particular seniority scheme that, viewed in isolation, embody or effectuate the principle that length of employment will be rewarded. In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment.

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[4] Boersig maintains that he can "hardly be said to be challenging a seniority rule" because he had the most seniority of anyone who expressed an interest in the Repairman position that became available in 1996. He emphasizes that he "outranked" Gina Perry, the person who was promoted to the position in accordance with the term of the CBA, by some 60 months of divisional seniority. Mr. Boersig conveniently "picks and chooses" those aspects of seniority he finds beneficial to his position. If what he characterizes as "true" seniority were the only determinative factor, Gina Perry would still be entitled to the Repairman position, because the record shows that she has more length of service with UE than Boersig. If Boersig's claim that the preference given to Installers when filling Repairman positions is not part of a seniority system, then neither is the preference he seeks based on the length of his service in the Meter Division as a Helper.

Id. at 607. The Court noted that Title VII was passed against the backdrop of the long-standing national labor policy of allowing freedom to establish conditions of employment through the collective bargaining process, and that seniority systems, "reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes." *Id.* at 608.

Although Boersig attempts to equate the promotional series seniority system at issue here with hiring preferences based on such personal characteristics as height, strength and education, that comparison simply does not hold water. The fact that the seniority provision in question combines job classification with length of service in determining promotions does not depart from commonly accepted concepts of seniority. It is, in fact, quite similar to examples of valid seniority systems this Court offered in *California Brewers.* The Court recognized, for example, that every seniority system must include rules delineating when and how seniority begins accruing. Thus, a collective bargaining agreement could specify that an employee begins to accumulate seniority rights at the time he begins employment with the company, at the time he begins employment within the industry, at the time he begins performing a particular job function, or only after a probationary period of employment. *Id.* at 607 n. 17. Similarly, the Court recognized that seniority systems must also have rules that define "which passage of time will 'count' towards accrual of seniority and which will not." *Id.* at 607.

Under Boersig's analysis, any seniority provisions based in part on time spent in a particular job classification would not be considered a bona fide seniority

system. This argument has no support in *California Brewers*. To the contrary, the Court specifically noted in that case that "the time an employee works in a particular job classification might determine his seniority." *Id.* at 607 n. 19. The Eighth Circuit's holding that the promotional system in the CBA is a bona fide seniority system,[5] even though it is not based merely on total length of employment, is entirely consistent with *California Brewers*.

II. The ADA Does Not Require UE To Violate A Bona Fide Seniority Provision In A Collective Bargaining Agreement Under Either A Reasonable Accommodation Or A Disparate Impact Analysis

Alternatively, Boersig maintains that, under a disparate impact analysis, the ADA required UE to promote him to Repairman ahead of Installers who would be entitled to the position under the CBA, notwithstanding the existence of a bona fide seniority system. He cites no cases that support this argument.

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[5] A seniority system is "bona fide" where it was "'created for legitimate purposes, rather than for the purpose of discrimination.'" *Boersig v. Union Electric Company*, 219 F.3d 816, 821-22 (8th Cir. 2000) (quoting *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041,1046 n. 7 (7th Cir. 1996), *cert. denied*, 520 U.S. 1146 (1997)). Boersig has neither suggested nor shown that the seniority system challenged in the present case was adopted by UE and the Union for improper or discriminatory purposes. Thus, while it is true that an employer cannot use a collective bargaining agreement to accomplish what it would be prohibited from doing under the ADA, Boersig has not claimed, nor is there any evidence, that the seniority provision at issue was created or administered, even in part, to avoid any obligations under the ADA.

Moreover, in making this argument, Boersig largely ignores the substantial precedent in both the Eighth and other circuits, holding that the ADA does not require an employer to accommodate a disabled employee by violating a bona fide seniority system. *See, e.g., Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995). *See also Davis v. Florida Power & Light Company,* 205 F.3d 1301, 1307 (11th Cir.) (the ADA does not require accommodations that contravene the seniority rights of other employees under a collective bargaining agreement), *cert. denied,* 121 S.Ct. 304 (2000); *Willis v. Pacific Maritime Association*, 162 F.3d 561, 565-566 (9th Cir. 1998) (an employee's proposed accommodation under the ADA is unreasonable if it conflicts with a bona fide seniority system established under a collective bargaining agreement); *Feliciano v. State of Rhode Island,* 160 F.3d 780, 787 (1st Cir. 1998) (the ADA does not require an employer to violate the provisions of a collective bargaining agreement or violate the rights of other employees under the agreement in making accommodations); *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1272 n. 5 (10th Cir. 1998) (plaintiff's proposed transfer which would violate the seniority provisions of a collective bargaining agreement is not required by the ADA), *cert. denied*, 119 S.Ct. 2018 (1999); *Cassidy v. Detroit Edison Co.,* 138 F.3d 629, 634 (6th Cir. 1998) (reassignment as an accommodation under the ADA does not require violating another employee's rights under a collective bargaining agreement); *Kralik v. Durbin*, 130 F.3d 76, 81, 83 (3d Cir. 1997) ("an accommodation to one employee that violates the seniority rights of other employees in a collective bargaining agreement is simply not reasonable"); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997) (the ADA does not require an employer to make an accommodation that would be

inconsistent with the rights granted to other employees under a collective bargaining agreement), *cert. denied*, 522 U.S. 1115(1998); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051(7th Cir. 1996) ("the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees"), *cert. denied*, 520 U.S. 1146 (1997). *But cf. Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000) (rejecting a per se rule barring reassignment as a reasonable accommodation when it would conflict with a seniority system in the context of a seniority system not grounded in a collective bargaining agreement).

Boersig essentially dismisses this clear line of precedent on the ground that these cases were "reasonable accommodation" cases, whereas he is invoking a disparate impact theory of liability.[6] But the fundamental policy considerations underlying these cases apply with equal force in both contexts. As the Seventh Circuit explained in *Eckles*, the issue is "whether the rights granted under the ADA itself extend so far as to trump otherwise legitimate, collectively bargained seniority rights." 94 F.3d at 1045. The answer is no, regardless of whether a plaintiff describes his claim as a "reasonable accommodation" claim or as a "disparate impact" claim.

Boersig seeks to avoid this result by emphasizing that the ADA, unlike Title VII and the ADEA, has no language exempting seniority systems from claims of dis-

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[6] Boersig has apparently abandoned the reasonable accommodation claim he pursued in the District Court and in the Eighth Circuit.

crimination. He submits that the seniority provision that requires UE to offer vacant Repairman positions to Installers before they are offered to Helpers is a "selection criterion" which is unlawful as applied to him, because, without any sound business justification, it tends to screen him out from successfully obtaining a Repairman position, in violation of 42 U.S.C. § 12112(b)(6) of the ADA.

Again, Boersig cites no case law in support of his argument that any bona fide seniority system should be considered a "selection criterion" for purposes of Section 12112(b)(6). He merely insists that "anything an employer uses to select an employee for a job or other employment benefit" must be considered as "selection criteria." Similarly, Boersig has cited no case in which an employer has been required under the ADA to waive a legitimate, collectively-bargained seniority provision, neutral on its face, on the ground that it has a "disparate impact" on a particular disabled employee.[7] There are, however, strong policy considerations that weigh against any such unduly sweeping interpretation.

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[7] Boersig's reliance on *Craig v. Alabama State University,* 804 F.2d 682 (11th Cir. 1986), is misplaced. *Craig* involved a reverse discrimination claim based on a University policy of granting hiring preferences to current employees on work study programs. The plaintiff, a white female, asserted a disparate impact claim against the backdrop – and as a continuation – of prior proceedings in which the University was held to have engaged in a pattern and practice of discrimination against whites, and had been enjoined from engaging in further discriminatory hiring practices. The present case arises against no similar backdrop of established discrimination. Furthermore, *Craig* did not involve a bona fide seniority system within a carefully negotiated collective bargaining agreement, as the present case does.

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The approach argued for by Boersig invites enormous disruption to "this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers,* 444 U.S. at 608 (citing *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979)). His approach would, in the context of collective bargaining agreements, subject an employer to the Hobson's choice of violating either the ADA or the National Labor Relations Act, or at least subjecting itself to the threat of litigation under these statutes, any time a legitimate seniority provision was claimed to have an adverse impact on a single disabled employee. Requiring an employer to violate seniority rights would not only subject the employer to the cost of defending itself

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Footnote 7 Continued

Boersig also argues that the Eighth Circuit's decision "makes sense only if Congress meant to exempt all selection criteria in collective bargaining agreements from disparate impact analysis under Title VII and the ADA." This misguided argument is based on a significant misreading of the Eighth Circuit's decision. The Eighth Circuit merely rejected Boersig's unsupported argument that a bona fide seniority system in a collective bargaining agreement should be considered a "selection criterion" within the meaning of the ADA. The Eighth Circuit did not hold in *Boersig* that any term in a collective bargaining agreement would necessarily be immune from disparate impact analysis. Rather, the Court correctly held that where, as here, there is absolutely no evidence that a seniority system was designed to discriminate against the disabled, the ADA does not require that the rights of other employees under the agreement be disrupted, whether the relief sought is denominated as a request for reasonable accommodation or a claim of disparate impact.

against grievances and the risk that it might be subject to a costly remedy, but would impose an unfair burden on the disabled employee's co-workers, who would lose the benefit of their seniority status. *See Kralik*, 130 F.3d at 83 and n. 8.

Boersig insists that such intrusions would be rare but, in fact, the possibility exists under every seniority system that a particular disabled employee may be screened out from a job because of job classification prerequisites established through collective bargaining. That does not mean a bona fide seniority system is a discriminatory "selection criterion." As the Eighth Circuit stated,

> Including seniority systems within the definition of "selection criteria" would jeopardize many carefully negotiated CBAs because virtually all seniority systems contain prerequisites for movement between jobs. . . . Boersig's disparate impact argument would require an employer to accommodate a disabled employee by violating the express terms of a CBA. However, we have repeatedly held that the ADA does not require an employer to "take action inconsistent with the contractual rights of other workers under a collective bargaining agreement.". . . . [T]he ADA does not require an employer to renegotiate a bona fide seniority system to avoid "screening out" a disabled employee who may not be able to reach the highest rung on a promotional series because of disability.

219 F.3d at 822 (citation omitted).

Seniority systems in collective bargaining agreements create rights in union members, which are protected by the National Labor Relations Act. These rights are

entitled to protection from unnecessary interference, regardless of whether a plaintiff asserting rights under the ADA presents his claim as one for reasonable accommodation, or as a claim that the seniority system in question has a disparate impact on him because he is disabled. Either way, the plaintiff is asking the court "to disrupt a carefully negotiated agreement between union and employer at the expense of other union employees who had legitimate expectations of advancement based on the governing CBA." *Boersig*, 219 F.3d at 822. As the Eighth Circuit indicated, such judicial intrusion into labor relations might be warranted if an employee could show that the seniority system was designed to discriminate against the disabled. But where, as in the present case, there is absolutely no evidence or suggestion that the seniority system was adopted for any improper or discriminatory purpose, no such judicial intrusion is justified. *Id.*

This reasoning is not altered by the fact that the ADA contains no express language exempting seniority systems. As the Seventh Circuit explained in *Eckles*, the Rehabilitation Act also contains no such exemption, yet courts have unanimously concluded that the Rehabilitation Act does not require infringing on seniority rights. 94 F.3d at 1047-49 and n. 13. There is similarly no reason to conclude that the absence of express protection of seniority rights in the ADA is determinative. "Congress drafted the ADA against the backdrop of well-established precedent that 'reasonable accommodation' under the Rehabilitation Act had never been held to require trumping the seniority rights of other employees." *Id.* at 1048.

This Court has long recognized the special status and importance of bona fide seniority systems. *See, e.g.*,

Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977). At the core of long-standing and well-established national labor relations policy is the emphasis on the importance of collective bargaining "aimed at effecting workable and enforceable agreements between management and labor." *Hardison*, 432 U.S. at 79. "[C]ollectively bargained seniority rights have a pre-existing special status in the law and . . . Congress to date has shown no intent to alter this status by the duties created under the ADA." *Eckles*, 94 F.3d at 1052. *See also Davis*, 205 F.3d at 1307. *Cf. Hardison*, 432 U.S. at 79 ("without a clear and express indication from Congress, we cannot agree...that an agreed-upon seniority system must give way when necessary to accommodate religious observances").

Relying on his unsupported insistence that a bona fide seniority system is a "selection criterion," Boersig broadly asserts that, where disabled employees are concerned, "Congress has struck the balance of competing interests in favor of the employee - *not* the employer or other non-disabled employees." That is not the case. Congress enacted the ADA to eliminate discrimination and establish a "level playing field" for disabled workers; "it did not do so in the name of discriminating against persons free from disability." *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 700 (7th Cir. 1998). In the guise of a disparate impact analysis, what Boersig actually seeks is not a level playing field, free from improper discrimination, but the kind of preferential treatment to which the ADA does not entitle him.

Ultimately, Boersig offers no rationale for disregarding the rights of other employees under a collective bargaining agreement simply because a plaintiff de-

scribes his claim as a "disparate impact" claim rather than a "reasonable accommodation" claim. To the contrary, Boersig's claim here that the seniority provision of the collective bargaining agreement should be ignored because it may affect his chances of becoming a Repairman is of the very same fabric as a claim for an accommodation in violation of a bona fide seniority provision. If, as the many appellate courts cited above make clear, accommodations in violation of bona fide seniority provision in a collective bargaining agreement are unreasonable and not required, then it would be wholly inconsistent and irrational to hold that, absent proof of independent business justification, those same bona fide provisions may, under the same facts, violate the ADA under a disparate impact analysis.

CONCLUSION

For the foregoing reason, the Petition for Writ of Certiorari filed by Randall Boersig should be denied

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